Bumiputra-Commerce Bank Bhd v Augusto Pompeo Romei & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2282–09 OF 2011
RAMLY ALI, MAH WENG KWAI AND DAVID WONG JJCA
12 DECEMBER 2013

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Companies and Corporations — Resolutions — Directors' resolution — Directors' resolution forged — Whether third-party charge made pursuant to forged resolution void — Whether innocent chargee protected by Turquand's Rule — Whether charge executed in compliance with company's articles of association and itself free from fraud or other irregularity — Whether chargee's title and interest protected under s 340 of the National Land Code — Whether directors whose signatures on resolution were forged had locus standi to sue for fraud and forgery in their own right — Whether company proper plaintiff to ask for directors' resolution and charge to be declared void

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The respondents together with the first and second defendants in the suit before the High Court ('Singaravelu' and 'Amudah Devi') were at all material times directors of the fourth defendant in that suit ('Quickpack'). The respondents and Singaravelu were also shareholders in Quickpack whilst Singaravelu and Amudah Devi were also directors in another company ('Malaysian Aerosols') to whom the appellant granted banking facilities in consideration for a third party charge ('the charge') executed in its favour by Quickpack over one of its properties. In the action before the High Court the respondents sought to (i) declare void a directors' resolution of Quickpack authorising its directors to execute the charge because the respondents' signatures on the resolution had been forged, and (ii) declare the charge void and unlawful. The respondents pleaded that without their knowledge, Singaravelu and Amudah Devi had forged their signatures on the directors' resolution and then executed the charge as directors of Quickpack. The appellant contended that the charge was lawful as, inter alia, it had no knowledge of the illegality of the directors' resolution; that the company's memorandum and articles allowed the two directors to create the charge under seal; and that based upon Turquand's Rule the appellant was entitled to assume the internal management acts of Quickpack had been regularly performed. In giving judgment for the respondents, the High Court found as a fact that their signatures on the directors' resolution had been forged by Singaravelu and Amudah Devi, and that as the resolution was invalid, the charge was also invalid as it was registered pursuant to a forged directors' resolution and was therefore liable to be set aside under s 340(2)(b) of the National Land Code ('Code'). Although the appellant had pleaded in its defence that the

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respondents did not have locus standi to have commenced the suit in their personal capacities against the appellant, that issue was not included among the issues to be tried before the trial court and the trial judge did not consider that issue at all in his grounds of judgment. The appellant raised the issue of *locus* again in its instant appeal.

Held, allowing the appeal and declaring the charge to be valid notwithstanding the invalidity of the directors' resolution:

(1) The respondents did not have locus standi to have commenced the action in the High Court against the appellant. They were not privy to the charge. The property that was charged was owned by Quickpack and the charge was executed between the appellant and Quickpack and not between the appellant and the respondents. The respondents' suit founded on fraud and forgery should have been brought by Quickpack against Singaravelu, Amudah Devi and Malaysian Aerosols and not by themselves. The claim by the respondents was not a derivative action brought for the benefit and on behalf of Quickpack but a claim by them as shareholders for damages for their own benefit. The respondents' lack of locus itself was sufficient for the appeal to be allowed and the High Court's decision to be set aside (see paras 17, 19, 23 & 27).

(2) The fundamental issue of locus went to the heart of the matter and the jurisdiction of the trial court. Where a party did not have the locus standi to bring an action, the court would not have the jurisdiction to determine the issue. The court could not agree with the respondents' contention that just because the issue of locus was not included as an issue to be tried, it necessarily meant that it was implied the respondents did have the locus (see paras 24–25).

(3) The court agreed with the trial judge's finding that the respondents' signatures on the directors' resolution had been forged by Singaravelu and Amudah Devi. Notwithstanding that, Turquand's Rule applied to save the charge from being invalid (see paras 30 & 43).

(4) Applying Turquand's Rule, the appellant was entitled to presume the internal procedures of Quickpack had been fully complied with and that Singaravelu and Amudah Devi had ostensible authority to execute the charge in its favour as article 97 of the company's articles of association empowered them to do so. Whilst Singaravelu and Amudah Devi did not have the ostensible authority to forge the respondents' signature on the resolution, they nonetheless had the ostensible authority to execute the charge. The appellant had no notice or knowledge of any wrongdoing on the two directors' part (see paras 47, 50–51 & 53).

(5) The fact that Singaravelu and Amudah Devi had forged the directors' resolution meant they did not have the authority to pass the resolution; it

did not mean they did not have the authority to execute the charge which itself was not forged nor irregular in any form. The fraud and forgery pleaded by the respondents was against the two directors of Quickpack and had nothing to do with the appellant (see paras 44 & 46).

(6) The appellant's title and interest in the charge was indefeasible as the charge was accepted in good faith and for valuable consideration. There was no evidence to suggest the appellant knew of the forged directors' resolution. It was an innocent party and its position was protected by s 340(1) of the Code (see para 55).

[Bahasa Malaysia summary

Responden-responden bersama-sama dengan defendan pertama dan kedua dalam guaman di hadapan Mahkamah Tinggi ('Singaravelu' dan 'Amudah Devi') yang pada semua masa material merupakan pengarah-pengarah defendan keempat dalam guaman tersebut ('Quickpack'). Responden-responden dan Singaravelu juga adalah pemegang saham-pemegang saham di Quickpack manakala Singaravelu dan Amudah Devi juga merupakan pengarah-pengarah dalam syarikat lain ('Malaysian Aerosols') yang mana perayu memberikan kemudahan perbankan sebagai balasan untuk gadaian pihak ketiga ('gadaian') yang disempurnakan bagi pihaknya oleh Quickpack terhadap satu daripada hartanah-hartanahnya. Di dalam satu tindakan di hadapan Mahkamah Tinggi responden-responden menuntut untuk (i) mengisytiharkan ketaksahan resolusi pengarah Quickpack yang membenarkan pengarah-pengarahnya untuk menyempurnakan gadaian kerana tandatangan responden-responden ke atas resolusi tersebut telah dipalsukan, dan (ii) mengisytiharkan gadaian tersebut tidak sah dan salah di sisi undang-undang. Responden-responden memplid bahawa tanpa pengetahuan mereka, Singaravelu dan Amudah Devi telah memalsukan tandatangan mereka ke atas resolusi pengarah dan kemudiannya menyempurnakan gadaian sebagai pengarah-pengarah Quickpack. Perayu menghujah bahawa gadaian tersebut adalah sah memandangkan, antara lainnya, perayu tidak mengetahui ketaksahan resolusi pengarah; bahawa memorandum syarikat dan artikel-artikel membenarkan dua pengarah untuk membuat gadaian di bawah meterai; dan berdasarkan Prinsip Turquand's perayu berhak untuk mengandaikan tindakan pengurusan dalaman Quickpack telah dilaksanakan mengikut aturan. Dalam memberikan penghakiman kepada responden-responden, Mahkamah Tinggi mendapati sebagai satu fakta bahawa tandatangan mereka ke atas resolusi pengarah telah dipalsukan oleh Singaravelu dan Amudah Devi, dan bahawa memandangkan resolusi tersebut adalah tidak sah, gadaian juga tidak sah memandangkan ia didaftarkan menurut resolusi pengarah yang dipalsukan dan oleh itu bertanggungan untuk diketepikan di bawah s 340(2)(b) Kanun Tanah Negara ('Kanun'). Walaupun perayu memplid dalam pembelaannya bahawa responden-responden tidak mempunyai locus standi untuk memulakan guaman dalam kapasiti mereka

terhadap perayu, bahawa isu tersebut tidak dimasukkan di antara isu-isu untuk diputuskan di hadapan mahkamah perbicaraan dan hakim perbicaraan tidak mempertimbangkan isu tersebut sama sekali dalam alasan penghakimannya. Perayu mengemukakan isu *locus* sekali lagi dalam rayuannya ini.

Diputuskan, membenarkan rayuan dan mengisytiharkan gadaian sebagai sah walaupun dengan ketaksahan resolusi pengarah:

(1) Responden-responden tidak mempunyai locus standi untuk memulakan tindakan di Mahkamah Tinggi terhadap perayu. Mereka tidak mempunyai kepentingan kepada gadaian. Hartanah yang digadaikan dimiliki oleh Quickpack dan gadaian tersebut disempurnakan di antara perayu dan Quickpack dan bukannya di antara perayu dan responden-responden. Guaman responden-responden berasaskan penipuan dan pemalsuan seharusnya dikemukakan oleh Quickpack terhadap Singaravelu, Amudah Devi dan Malaysian Aerosols dan bukannya oleh mereka. Tuntutan oleh responden-responden bukannya tindakan derivatif yang dikemukakan untuk kepentingan dan bagi pihak Quickpack tetapi satu tuntutan oleh mereka sebagai pemegang saham-pemegang saham untuk ganti rugi bagi kepentingan mereka sendiri. Kekurangan *locus* dengan sendirinya mencukupi untuk membenarkan rayuan dan keputusan Mahkamah Tinggi untuk diketepikan (lihat perenggan 17, 19, 23 & 27).

(2) Isu utama *locus* merupakan tunjang perkara tersebut dan bidang kuasa mahkamah perbicaraan. Apabila pihak tidak mempunyai locus standi untuk mengemukakan tindakan, mahkamah tidak mempunyai bidang kuasa untuk menentukan isu tersebut. Mahkamah tidak bersetuju dengan hujahan responden-responden bahawa hanya disebabkan isu *locus* tidak dimasukkan sebagai satu isu untuk diputuskan, ia bermakna bahawa adalah tersirat bahawa responden-responden mempunyai locus (lihat perenggan 24–25).

(3) Mahkamah bersetuju dengan dapatan hakim perbicaraan bahawa tandatangan responden-responden ke atas resolusi pengarah telah dipalsukan oleh Singaravelu dan Amudah Devi. Selain itu, Prinsip Turquand's digunakan untuk menyelamatkan gadaian daripada ketaksahan (lihat perenggan 30 & 43).

(4) Dengan mengguna pakai Prinsip Turquand's, perayu berhak untuk menganggap prosedur-prosedur dalaman Quickpack telah dipatuhi sepenuhnya dan bahawa Singaravelu dan Amudah Devi kononnya mempunyai kuasa untuk menyempurnakan gadaian bagi pihak Quickpack memandangkan artikel 97 artikel persatuan syarikat memberikan kuasa kepada mereka untuk berbuat demikian. Walaupun Singaravelu dan Amudah Devi kononnya tidak mempunyai kuasa untuk memalsukan tandatangan responden-responden pada resolusi, mereka

bagaimanapun dikatakan mempunyai kuasa untuk menyempurnakan gadaian. Perayu tidak mempunyai notis atau pengetahuan mengenai sebarang salah laku bagi pihak dua pengarah tersebut (lihat perenggan 47, 50–51 & 53).

(5) Fakta bahawa Singaravelu dan Amudah Devi telah memalsukan resolusi pengarah bermaksud mereka tidak mempunyai kuasa untuk meluluskan resolusi; ini tidak bermakna mereka tidak mempunyai kuasa untuk menyempurnakan gadaian yang dengan sendirinya tidak dipalsukan atau tidak di luar aturan dalam apa-apa bentuk. Penipuan dan pemalsuan yang diplid oleh responden-responden adalah terhadap dua pengarah Quickpack dan tidak berkaitan dengan perayu (lihat perenggan 44 & 46).

(6) Hak milik dan kepentingan perayu di dalam gadaian adalah dinafikan memandangkan gadaian diterima dengan suci hati dan untuk pertimbangan berharga. Tiada keterangan menunjukkan perayu mengetahui mengenai resolusi pengarah dipalsukan. Ini merupakan pihak yang tidak bersalah dan kedudukannya dilindungi oleh s 340(1) Kanun (lihat perenggan 55).]

Notes

For a case on directors' resolution, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 863.

Cases referred to

Abdul Rahim bin Aki @ Mohd Haki v Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors [1995] 4 CLJ 551, CA (refd)

Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45; [1997] 1 CLJ 497, FC (refd)

Bumiputra Merchant Bankers Bhd v Supreme-QBE Insurance Bhd [1990] 2 MLJ 247, HC (refd)

CS Petroleum (M) Sdn Bhd v Public Bank Berhad & Other Cases [2011] 1 LNS 1349, FC (refd)

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61; [1997] 2 CLJ 153, FC (refd)

Foss v Harbottle (1843) 67 ER 189 (refd)

Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480, CA (refd)

Greenwood v Martins Bank Ltd [1933] AC 51, HL (refd)

Hua Rong Finance Ltd v Mega Capital Enterprise Ltd & Anor [1998] 4 HKC 532 (refd)

Kelapa Sawit (Telok Anson) Sdn Bhd v Yeoh Kim Leng & Ors [1991] 1 MLJ 301; [1991] 1 SCR 415, SC (refd)

Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien [2001] 1 MLJ 57; [2001] 1 CLJ 316, CA (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719; [1995] 3 CLJ 520, CA (refd)
Negara Traders Ltd v Pesuroh Jaya Ibu Kota, Kuala Lumpur [1969] 1 MLJ 123; [1969] 1 LNS 118 (consd)
Northside Developments Pty Ltd v Registrar-General and Others (1990) 2 ACSR 161, HC (refd)
OCBC Bank (M) v Lee Lee Fah & Ors and another appeal [2000] 1 MLJ 134, CA (refd)
People's Insurance Co (M) Sdn Bhd v People's Insurance Co Ltd & Ors [1986] 1 MLJ 68 (refd)
Public Bank Bhd v Metro Construction Sdn Bhd [1991] 3 MLJ 56; [1991] 3 CLJ 479, HC (refd)
Royal British Bank v Turquand (1856) 119 ER 474 (folld)
Ruben v Great Fingall Consolidated [1906] AC 439, HL (consd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1, FC (distd)
Uxbridge Permanent Benefit Building Society v Pickard [1939] 2 All ER 344, CA (refd)
Yong Tim v Hoo Kok Chong [2005] 3 CLJ 229, FC (refd)

Legislation referred to

Companies Act 1965 s 20(1)
Evidence Act 1950 s 73(1)
National Land Code s 340(1), (2)(b), Form 16A

Appeal from: Suit No D6–22–2017 of 2003 (High Court, Kuala Lumpur)

S Ramesh (Gary Yap with him) (Adnan Sundra & Low) for the appellant.
Avtar Singh (Amarjeet Singh with him) (Avtar) for the respondents.

Mah Weng Kwai JCA (delivering judgment of the court):

BRIEF FACTS

[1] In 1999, the appellant approved and disbursed term loan and overdraft facilities in the sum of RM400,000 to Malaysian Aerosols Manufacturer Sdn Bhd ('Malaysian Aerosols'). In consideration thereof, a third party charge over a piece of property owned by Quickpack (M) Sdn Bhd ('the fourth defendant') was executed by the fourth defendant in favour of the appellant. The fourth defendant was wound up on 24 August 2001 and the official receiver was appointed the liquidator.

[2] The respondents and Singaravelu s/o Ratnnavelu ('the first defendant') were at all material times directors and shareholders of the fourth defendant

while Amudah Devi d/o Maruthamuthu ('the second defendant') was a director of the fourth defendant. The first and second defendants were also the directors of Malaysian Aerosols.

[3] A directors' resolution of the fourth defendant was purportedly passed on 3 April 1999 giving approval and authority to the directors of the fourth defendant to execute the relevant documents for the creation of the third party charge over its property as security for the banking facilities granted to Malaysian Aerosols.

[4] The third party charge in Form 16A National Land Code was then executed by the first and the second defendants as the directors of the fourth defendant on 2 August 1999 and was registered with the Selangor Land Office on 9 August 1999.

THE RESPONDENTS' POSITION

[5] The respondents deny having signed the directors' resolution and plead that they were forged by the first and second defendants, the existence of which only came to their knowledge subsequently. The third party charge in favour of the appellant had been created without their knowledge, consent or approval in their capacity as directors and/or shareholders of the fourth defendant. The respondents' case was supported by the absence/non-existence of any resolution on the third party charge duly certified by the company secretary kept in the books of the fourth defendant nor was there any entry or record of the resolution in the statutory books of the fourth defendant.

[6] Upon discovery the respondents filed a suit against the appellant and three others namely the first, second and fourth defendants for the following, inter alia, reliefs:

(a) a declaration that the purported signatures of the respondents as appearing on the directors' resolution dated 3 April 1999 of the fourth defendant are of no legal effect thereby rendering the said resolution void and/or unlawful;

(b) a declaration that the third party charge dated 2 August 1999 vide Resolution No 6113/99, *Jilid* No 773, Folio 5, purportedly granted in favour of the appellant is void and/or unlawful.

THE APPELLANT'S POSITION

[7] The appellant's position was that it relied mainly on the valid third party

charge which was duly executed by the fourth defendant, although it was premised on an invalid directors' resolution pursuant to the principle laid down in the case of *Royal British Bank v Turquand* (1856) 119 ER 474 (Turquand's Rule) to wit, that a person contracting with a company and dealing in good faith may presume that acts performed within the company's constitution and powers were duly performed and the person is not bound to inquire whether acts of internal management have been regularly complied with.

[8] The appellant also relied on s 20(1) of the Companies Act 1965 on ultra vires transactions, which provides that no act or purported act of a company shall be invalid by reason only of the fact that the company has without capacity or power to do the act. In support of its contention, counsel for the appellant cited the cases of *Bumiputra Merchant Bankers Bhd v Supreme-QBE Insurance Bhd* [1990] 2 MLJ 247 and *Public Bank Bhd v Metro Construction Sdn Bhd* [1991] 3 MLJ 56; [1991] 3 CLJ 479. In the latter case, Lim Beng Choon J held that s 20(1) of the Act abolished the otherwise rigorous effect of the ultra vires doctrine namely, even where a third party charge was ultra vires the company's memorandum and articles of association, this could be saved by s 20(1).

DECISION OF THE HIGH COURT

[9] After a full trial in which the appellant elected not to call any witnesses and relied on its submission, the learned trial judge found as of fact that the signatures of the respondents on the directors' resolution had been forged by the first and second defendants and as the resolution had not been signed by ajl the directors of the fourth defendant, the provisions of article 119 of the articles of association had not been complied with and accordingly there was no valid resolution passed. The learned trial judge held that the directors' resolution did not exist legally for all intents and purposes and therefore did not give any valid authority for the consequential execution of any document by (only) one or two directors of the fourth defendant (and not by all the four directors).

[10] The learned trial judge held that the use of the common seal of the fourth defendant was not within the purport of article 121 of the company's articles of association and thus the third party charge was not valid as the authority of the board of directors to use it had not been lawfully given.

[11] The learned trial judge also rejected the claim of indefeasibility of the third party charge by the appellant on the ground that the charge was accepted in good faith and for valuable consideration on the premise that the third party

charge was registered based on the forged directors' resolution, a void instrument, and as such the charge was liable to be set aside under s 340(2)(b) of the National Land Code.

[12] Accordingly, the learned trial judge held that the respondents had proven their case and allowed the two declarations sought with damages to be assessed together with interest and costs.

APPEAL BY THE APPELLANT

[13] Being dissatisfied with the decision of the High Court, the appellant filed its appeal to the Court of Appeal.

ISSUES TO BE DETERMINED BY THE COURT OF APPEAL

[14] The main issues raised by the appellant in the memorandum of appeal, inclusive of the issue of locus standi after leave to amend the memorandum of appeal was granted were inter alia, as follows:

(a) whether the respondents had the locus standi to commence the suit against the appellant;

(b) whether the signatures of the respondents in the directors' resolution of 3 April 1999 were forgeries;

(c) whether the internal management rule (Turquand's Rule) applied to enable the appellant to presume that the directors' resolution was validly passed and the third party charge validly created; and

(d) whether the third party charge was defeasible.

DECISION OF THE COURT

[15] Upon reading the record of appeal, the written submissions of counsel for the appellant and respondents and upon hearing the oral submissions of counsel aforesaid, the court allowed the appeal with costs.

[16] Being dissatisfied with the decision of the court the respondents have now applied for leave to appeal against the said decision in the Federal Court.

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GROUNDS OF DECISION

Issue 1 — Whether the respondents had the locus standi to commence this suit against the appellant

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[17] It was unanimously decided by the court that the respondents did not have the locus standi to commence this suit in their personal names and capacity against the appellant as they are merely contributories of the fourth defendant and not the registered owners of the property, the subject matter of the third party charge.

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[18] At all material times, it was an undisputed fact that the registered owner of the property is the fourth defendant and not the respondents and that the third party charge was executed between the appellant and the fourth defendant and not between the appellant and the respondents. That being the case, the court held that the respondents are not privy to the third party charge and hence did not have the locus standi to commence this action against the appellant.

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[19] The suit by the respondents was brought in their personal capacity and was not a derivative action brought on behalf of the fourth defendant. It was a claim by the respondents as shareholders for damages for the benefit of themselves and not for the fourth defendant, the company. As the claim was neither a derivative action nor a minority action, it did not come within the well established principle of *Foss v Harbottle* (1843) 67 ER 189.

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[20] The meaning of a derivative action was succinctly explained by Gopal Sri Ram JCA (as he then was) when delivering the judgment of the Court of Appeal in *Abdul Rahim bin Aki @ Mohd Haki v Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors* [1995] 4 CLJ 551. This is what His Lordship said:

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> A derivative action is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision making organs, and will not, for that reason permit an action to be brought in its name. In this circumstances a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. But in so doing he must cite the company and the wrongdoers as defendants and the title to the action must reflect that the suit is being brought in a representative capacity. The statement of claim or other pleading filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so, and further, there must be an express statement in the pleading that the action is being brought for the benefit of the company. A plaintiff in a derivative action cannot thus sue in his own name, without indicating that he is bringing the action in a representative capacity and for the benefit of the company.

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[21] Further, Loh Siew Cheang in his book *Corporate Powers Accountability*, (2nd Ed) at p 1146 opined that if the action is to recover loss suffered by the company on a completed ultra vires transaction, then a derivative action must be brought as the injured party is the company itself.

[22] There was nothing pleaded in the respondents' amended statement of claim to even suggest that the claim was a derivative action brought for the benefit of the fourth defendant (see *Kelapa Sawit (Telok Anson) Sdn Bhd v Dr Yeoh Kim Leng & Ors* [1991] 1 MLJ 301; [1991] 1 SCR 415).

[23] It is trite law that a company is a separate legal entity from its shareholders and directors (see *People's Insurance Co (M) Sdn Bhd v People's Insurance Co Ltd & Ors* [1986] 1 MLJ 68). Accordingly the respondents' suit founded on fraud and forgery should have been brought by the fourth defendant, the company itself being the registered owner of the property, against the first and second defendants and Malaysian Aerosols and not by themselves.

[24] Although the issue of locus standi was not an issue included in the issues to be tried before the learned trial judge, it was nonetheless pleaded by the appellant in para 8.12 of its amended defence and leave to appeal on this ground was granted by the Court of Appeal on 4 January 2013. This court was keen to hear arguments by counsel for the appellant and the respondents on this fundamental issue of locus standi which went to the jurisdiction of the trial court and to the heart of the matter. The court cannot agree with counsel for the respondents that just because the issue of locus standi was not included as an issue to be tried, it necessarily meant that it was implied that the respondents did have the locus standi.

[25] Where a party does not have the locus standi to bring an action, the court will not have the jurisdiction to determine the issue. In the case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520, the Court of Appeal held as follows:

> Viewed from this standpoint, the justice of a case will ordinarily lie in favour of permitting a plea of illegality to be taken for the first time on appeal because it is unjust that a party who has broken the law should succeed. Similarly, justice would, in the usual way, favour the admission of a point that goes to the jurisdiction of the trial court because neither consent nor waiver may confer jurisdiction where none exists: and it is not in the interests of justice that a judgment of a court lacking jurisdiction should be permitted to stand.

[26] Interestingly, counsel for the respondents submitted that the respondents' claim was not to cancel the third party charge but merely for a

declaration that the charge was null and void. To our minds such a submission made little difference as the reliefs sought was really the flip side of the same coin.

[27] It is to be noted, with respect, that the issue of locus standi or the lack of it was neither addressed nor considered by the learned trial judge in his grounds of judgment. Be that as it may, this court is of the view that the lack of locus standi by the respondents by itself was sufficient for the court to allow the appeal and to set aside the order of the High Court.

[28] Notwithstanding the above, in the event this court is shown to be in error and it can be established by the respondents that they do have in law and in fact, the locus standi to bring this action then the court, relying on the operation of the Turquand's Rule will come to a similar conclusion that the appellant cannot be held liable to the respondents.

[29] For completeness, the Turquand's Rule and other issues raised in arguments by both counsel will now be considered below.

Issue 2 — Whether the signatures of the respondents in the directors' resolution of 3 April 1999 were forgeries

[30] The learned trial judge found as of fact that the signatures on the directors' resolution were forged by the first and second defendants. This court agreed with the finding and saw no reason to disturb that finding of fact.

[31] The respondents in their evidence had clearly stated that they did not sign the directors' resolution of 3 April 1999 and their evidence remained uncontroverted during cross-examination.

[32] Much was said by counsel for the appellant that the evidence of the hand writing examiner/expert (PW3) was inconclusive and that it was not safe for the court to conclude that the respondents' signatures were forgeries. Counsel for the appellant submitted that no original document containing the signatures of the respondents were given to PW3 for his analysis. The only documents forwarded to PW3 for examination were merely a photocopy of the directors' resolution and photocopies of other documents containing the signatures of the respondents. We are of the view that the complaint by counsel for the appellant seems misplaced as the original copy of the directors' resolution was in the possession of the appellant at all material times. Without having the opportunity to examine any original documents including the directors' resolution, PW3 in his evidence had candidly stated that his report

was only a probable conclusion that the signatures purported to be those of the respondents were forgeries. PW3 qualified his report in that it required further assessment.

[33] The court is mindful that the use of photocopies of original documents in handwriting/signature analysis may result in inaccurate and inconclusive findings as fine hand or pen movements would not be detectable as was held in *CS Petroleum (M) Sdn Bhd v Public Bank Berhad & Other Cases* [2011] 1 LNS 1349.

[34] The court is of the view that although the report of PW3 was not conclusive it nonetheless served to assist the court in its finding (see *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61; [1997] 2 CLJ 153 (FC)). Given the undisputed fact that the respondents had denied signing the directors' resolution and that there was no reason whatsoever to doubt the veracity of their evidence especially since there was no other or opposing hand writing expert's report to contradict or contravene PW3's report, the court was prepared on a balance of probabilities (see *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45; [1997] 1 CLJ 497 (FC), *Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien* [2001] 1 MLJ 57; [2001] 1 CLJ 316 and *Yong Tim v Hoo Kok Chong* [2005] 3 CLJ 229 (FC), to uphold the finding by the learned trial judge that the signatures of the respondents were indeed forgeries. The court was entitled to give proper consideration and weight to the report of PW3 in the context of the evidence of the respondents. It was sufficiently corroborated by the evidence of the respondents and was in our view in satisfaction of the provisions of the s 73(1) of the Evidence Act 1950. In any event, the disputed signatures would have been compared by the learned trial judge himself with the genuine signatures of the respondents.

[35] The court is of the view that nothing much turns on the two subsidiary issues raised by counsel for the appellant namely, that PW3 was not given sufficient time to analyse the disputed signatures and to prepare his report and that the respondents had failed to provide any evidence that they were not in Malaysia at the time their signatures were forged. These were minor issues and did not detract from the finding that the respondents' signatures were forgeries.

Issue 3 — Whether the internal management rule (Turquand's Rule) applied in favour of the appellant

[36] It was the appellant's case that it was entitled in law and in fact to presume under the internal management rule that the directors' resolution of the fourth defendant and the third party charge had complied with the various internal procedures stipulated in the memorandum and articles of association

of the fourth defendant and that as a result of this, the fourth defendant was liable for the third party charge executed by the first and second defendants on its behalf.

[37] Under this rule, which is commonly referred to as the Turquand's Rule or the internal management rule, Lord Campbell CJ enunciated the principle as follows:

> … persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular.

[38] The appellant contended that pursuant to cll 32 and 42 of its memorandum of association, the fourth defendant had the power and authority to consent to the creation of a third party charge over its property.

[39] Clauses 32 and 42 of the memorandum of association provide as follows:

> (32) To lend and advance money or give credit to such persons of companies and on such terms as may seem expedient, and in particular to customers and others having dealings with the company, and to guarantee the performance of any contract or obligation and the payment of money of or by any such persons or companies and generally to give guarantees and indemnities.
>
> (42) To sell, lease, mortgage, or dispose of the land and other property, assets or undertaking of the company or any part thereof for such consideration as the company may think fit, and in particular for shares, stock, debentures, or other securities of any other company whether or not having objects altogether or in part similar to those of the company.

[40] The appellant had accepted the third party charge in good faith and without notice of any irregularity in the directors' resolution of 3 April 1999.

[41] Apposite to this contention, the respondents submitted that the first and second defendants had acted in excess of authority and did not have the ostensible authority to pass the directors' resolution and to effect the third party charge. Counsel for the respondents relied largely on the dicta in *Ruben v Great Fingall Consolidated* [1906] AC 439 and in *Negara Traders Ltd v Pesuroh Jaya Ibu Kota, Kuala Lumpur* [1969] 1 MLJ 123; [1969] 1 LNS 118 and submitted that the Turquand's Rule does not apply to a forgery but merely to 'irregularities' in the management of the company 'that otherwise may affect a genuine transaction'.

[42] The learned trial judge also relied on the Hong Kong case of *Hua Rong*

Finance Ltd v Mega Capital Enterprise Ltd & Ors [1998] 4 HKC 532 wherein the court dismissed the plaintiffs case on the basis that a forged document is a nullity and, as such could not be 'saved' by an application of the Turquand's Rule.

[43] Having considered the dicta in both *Ruben*'s case and *Negara Traders*'s case, the court is of the view that the Turquand's Rule is nonetheless applicable to this case given the facts and circumstances pertaining herein.

[44] To begin with, it is not in dispute that the first and second defendants were at all material times lawful directors of the fourth defendant. The directors' resolution purportedly passed by the board of directors of the fourth defendant was an 'internal matter' in which the appellant was not involved nor was made aware of. The fraud and forgery denied by the respondents was a matter between the directors and the company. The fraud was pleaded against the first and second defendants and had nothing to do with the appellant. Importantly, it must be remembered that it is the directors' resolution which is said to be a forgery and is therefore void and of no effect. On the other hand, the third party charge was sufficiently executed by the first and second defendants, (without the signatories of the respondents) and there was no allegation of any forgery to taint the third party charge.

[45] Further, the memorandum and articles of association of the fourth defendant clearly allow for two directors to execute any documents under seal on behalf of the company. The third party charge was infact executed by the first and second defendants with the use of the company seal and there was no reason for the appellant to suspect that anything untoward had occurred for them to be put on notice.

[46] The fact that that the first and second defendants had forged the directors' resolution meant that they did not have the authority to pass the resolution but this does not mean that they did not have the authority to execute the third party charge. The third party charge itself was not forged nor irregular in any form and as such the position in law is that the first and second defendants as directors of the fourth defendant had the ostensible authority to enter into the third party charge and thereby bind the fourth defendant. It will be noted that importantly, the first and second defendants ostensibly acting on behalf of the board could exercise all the powers of the fourth defendant to charge its property. It will be useful at this juncture to consider article 97 of the articles of association of the fourth defendant which provides:

> The Board may exercise all the powers of the company to borrow money and to mortgage or charge, its undertaking, property and uncalled capital or any part thereof and to issue debentures, debenture stock and other securities whether out-right or as security for any debt, liability or obligation of the company or of any third party.

[47] In *Turquand*'s case, the court held that the transaction effected by the directors of the company without the prerequisite resolution was nonetheless valid. In this case, the appellant is entitled to presume that the internal procedures of the fourth defendant had been fully complied with and that the first and second defendants had the ostensible authority, (see *Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at p 503 for the meaning of 'apparent' or 'ostensible' authority) at the least, to execute the third party charge under seal in compliance with the articles of association of the fourth defendant. Article 121 of the articles of association expressly allowed the first and second defendants as directors of the fourth defendant to be in possession of the company seal. Article 121 of the articles of association reads as follows:

> The Directors shall provide for the safe custody of the seal which shall only be used by the authority of the Directors or of a Committee of the Directors authorized by the Directors in that behalf and every instrument to which the seal shall be affixed shall (subject to the provision of Article 11 in relation to share and debenture stock certificates and debentures) be signed by a Director and by the Secretary or by a second Director or by some other person appointed by the Directors for the purpose.

[48] To that extent it can be said that the entrustment of the company seal to the first and second defendants by the other directors constituted a 'holding out' that they did have the authority to affix the seal and execute the third party charge on behalf of the fourth defendant.

[49] In the case of *Northside Developments Pty Ltd v Registrar-General and Others* (1990) 2 ACSR 161 it was held that an instrument bearing a genuine seal and genuine signatures but executed without the authority of the company may be described as a forgery in the loose sense. A forgery in the strict sense, that is, an instrument bearing a false seal or signature, is binding on a company only if the company is estopped from denying both the falsity of the seal or signatures and the authority of the persons affixing the false seal or writing the false signature. But an instrument bearing a genuine seal and genuine signature, though it may be described as a forgery, is binding on the company if the company is estopped from denying the authority of the persons affixing the genuine seal and writing the genuine signature. And at p 186 Mason CJ delivering the judgment of the High Court of Australia said:

> Such an instrument, being regular in form, is binding on the company if it be executed for the purposes of the company's business or otherwise for the company's benefit and the party relying on it is not put on inquiry as to the authority of the persons who executed it to do so. If it transpires that the instrument was executed without the authority of the company, though it was apparently regular in form executed by officers or agents acting within the scope of their ordinary authority to execute such instruments, and used for the purposes of the company's business or otherwise for its benefit, the loss will fall on the company unless the party dealing with the company was put on inquiry. But if the party dealing with the company was put on inquiry and failed to make inquiry or, on inquiry, was not reasonably satisfied that the instrument was executed with the company's authority, the company will not be estopped from denying that it is bound by the instrument.

[50] To reiterate and at the expense of repetition, it was concluded by the court that there was no basis or reason for the appellant to inquire into the validity of the directors' resolution to determine whether it was validly executed by each of the directors of the fourth defendant. As can be seen, article 97 of the articles of association of the fourth defendant gave the first and second defendants the power to charge the fourth defendant's property by way of a third party charge.

[51] Even in the case of *Negara Traders*, Raja Azlan Shah J (as His Highness then was) after holding that the internal management rule only applied to irregularities that might otherwise affect a genuine transaction and that it could not apply to a forgery, recognised that there are two exceptions namely, either the defendants are estopped from setting up the forgeries (see *Greenwood v Martins Bank Ltd* [1933] AC 51) or that the impugned officer had such ostensible authority to render his employers (the company) liable for his act. To recap, while the court holds that the first and second defendants did not have authority, actual or ostensible, to forge the signatures of the respondents on the directors' resolution, they had in the circumstances of this case, the ostensible authority to execute and create the third party charge in favour of the appellant, who had no notice or knowledge of any wrongdoing on the part of the first and second defendants.

In the *Northside Developments*'s case Mason CJ further held that 'a company cannot give authority to fix a false seal and it is difficult to envisage a case in which there would be ostensible authority to write a false signature'.

[52] The court is of the view that the learned trial judge was correct in holding that the directors' resolution can only be valid and effectual if it is signed by *all* the directors for the time being entitled to receive the notice of the meeting of the board. See article 119 of the articles of association which reads as follows:

A resolution signed by all the Directors for the time being entitled to receive notice of a meeting of the board shall be as valid and effectual as a resolution passed at a meeting of the Board duly convened and held and may consist of several documents in the like form each signed by one or more Directors.

[53] The first and second defendants cannot be said to have the ostensible authority to forge the signatures of the respondents and thereafter maintain that the directors' resolution is valid although tainted with fraud and forgery. But while the first and second defendants did not have the ostensible authority to forge the signatures of the respondents on the directors' resolution, they nonetheless had the ostensible authority to execute the third party charge. Applying the Turquand's Rule on internal management procedures, the appellant was correct to presume that the third party charge had been validly created notwithstanding that the third party charge was premised on a directors' resolution which was tainted with illegality.

[54] For this court to hold otherwise would be to impose an exceedingly unreasonable and onerous burden on the appellant to determine that the directors' resolution was not a forgery when the resolution seemingly appeared to have been prima facie, passed in accordance with the requirements of the Memorandum and articles of association of the fourth defendant. The court cannot cast such a heavy duty on a third party when there is nothing to suggest any non-compliance of the memorandum and articles of association of the company or when the third party had not been put on notice of any form of irregularity. To keep the wheels of business turning and to promote business efficacy and trading, it is important for the law to remain practical and relevant. It will be impractical for a third party to conduct a due diligence exercise before each and every transaction is entered into. Time constraints and the ensuing financial burden on a third party will prove insurmountable and will hinder the growth and progress in the financial world. As was held in the case of *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 All ER 344 that 'it is quite obvious that the business of limited companies could never be carried on if everybody dealing with a company was at his peril bound to ascertain whether the internal administration of the company had been regularly conducted'.

Issue 4 — Whether the third party charge was defeasible

[55] On the issue of whether the third party charge was defeasible, the court is of the view that the appellant's title and interest in the third party charge was indefeasible as the charge was accepted in good faith and for valuable consideration. The appellant was an innocent party and its position was protected by s 340(1) of the National Land Code as there was no evidence to suggest that the appellant had knowledge of the forged directors' resolution. In

OCBC Bank (M) v Lee Lee Fah & Ors and another appeal [2000] 1 MLJ 134, the court held that the chargee's interest was indefeasible unless there was evidence to show that the bank had knowledge of the fraud or forgery, or misrepresentation or where the title or interest was unlawfully acquired.

[56] Counsel for the respondents relied on the case of *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1 where it was held by the Federal Court that the two charges registered in favour of the third respondent were liable to be set aside under s 340(2)(b) of the National Land Code as they were based on void instruments in that the relevant Forms 16A were not executed by the appellant but by the first respondent pursuant to a forged power of attorney. With respect, we think that *Tai Ying Hong*'s case can be distinguished from the present case. Firstly, it must be remembered that the signatures on the Form 16A were not forged. The Form 16A was duly signed by the first and second defendants and sealed as directors of the fourth defendant while in *Tan Ying Hong*'s case the forged signature appeared in the Form 16A itself. And secondly, it was not wrong for the appellant to presume, relying on the internal management rule, that the first and second defendants had the authority (ostensible) to execute the Form 16A on behalf of the fourth defendant.

CONCLUSION

[57] In the result the appellant's appeal was allowed with costs. The third party charge created in favour of the appellant in consideration of the banking facilities extended to Malaysian Aerosols was held to be valid notwithstanding that the directors' resolution was void and therefore invalid.

Appeal allowed and charge declared to be valid notwithstanding invalidity of directors' resolution.

Reported by Ashok Kumar